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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 904

CUMBERLAND FARMS NORTHERN, INC.
APPELLANT

v.

MAINE MILK COMMISSION
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

MOTION TO DISMISS

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ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

MOTION TO DISMISS

Appellee in the above entitled case moves to dismiss the appeal on the grounds that the decision below is clearly correct and that no substantial federal question is presented.

STATEMENT

Shortly after Cumberland Farms Northern, Inc. undertook to do business in Maine as a milk dealer, it issued redeemable coupons to its retail customers containing promises to pay the stated cash value when the Maine Milk Commission Law was adjudged unconstitutional. Thereupon, the Commission filed a complaint in Superior Court alleging that the reference coupons were destructive of the provisions of the milk control law. The trial court, after hearing, decreed that the coupon plan violated the subject statute; and enjoined

the further issuance of the coupons. Subsequently, the injunction was made permanent, and the firm appealed to the Maine Supreme Judicial Court. (This is one of six companion cases argued in the Law Court at the October Term, 1964.) In its appeal, Cumberland contended that the coupons should not have been enjoined (1) because they were not destructive of the milk control law; and (2) because the reference law was repugnant to the Fourteenth Amendment to the Constitution of the United States. Our Supreme Judicial Court adjudged that the coupons violated the Law, and that the Law was not contrary to the material mandate expressed in the Constitution of the United States.

In this appeal, Cumberland Farms Northern has seriously misstated the decision of the Maine Supreme Judicial Court. In the third paragraph of page 10 of the Jurisdictional Statement, the Appellant has advanced certain material taken from the Maine Court's decision and has stated that the same is an expression of the Court's position:

> "The Maine Court, in addition, has expressly recognized that the legal effect of said statute is to establish in the State of Maine
>
> > 'a system by which, permanently and unceasingly, the retail prices of milk must be fixed by an agency of government and that there can never be any period of time, regardless of the state of the market conditions in the industry, when a private businessman is at liberty to sell his own milk at such price as he may see fit * * *'
> >
> > (Transcript of Record, pp. 131, 132)
> > (Appendix A, p. 11a)"

A reading of the Law Court's decision at page 11a of the Jurisdictional Statement clearly points up Appellant's error. The Maine Supreme Judicial Court was not stating its own position, but was, instead, stating

an argument which had been advanced to the Court by Appellant. Incidentally, we note that Appellant has characterized the quote as stating a "drastic and extreme" position. (Jurisdictional Statement, p. 10) Because the reference quotation is in fact a contention which Appellant advanced to the Maine Court, and is not an expression of the Maine Court's position, Cumberland has described its position in this Appeal as "drastic and extreme". On that we agree.

Argument

I

The Decision Below is Clearly Correct.

In this case, the Maine Court has upheld the constitutionality of a public law enacted by the Maine Legislature pursuant to the police power of the State. Specifically, the Court said that the provisions of the Maine Milk Commission Law authorizing the establishment and change of minimum prices for milk does not violate either the "due process clause" or the "commerce clause" of the Constitution of the United States. The contents of the Maine decision do not merely reflect a knowledge of the existence of applicable, controlling adjudications issued by the highest Appellate Court in this Country and by the highest appellate courts in our sister states. Instead, the decision embraces these plural holdings to such an extent that their presence is reflected in the countenance of the Maine decree.

The Maine decision is rested upon the leading case of *Nebbia v. People of New York*, 291 U. S. 502, 54 S. Ct. 505 (1934) wherein the right to fix minimum prices for milk was upheld on constitutional grounds. Specifically, in that case the New York Milk Control Act, which authorized the establishment of minimum prices for milk, was not violative of the Fifth and Fourteenth Amendments to the Constitution of the United States. It has recently been stated, and we

agree, that all milk control acts were either patterned after or they contained the essentials of the Milk Control Act of New York, *Mississippi Milk Commission v. Vance*, 240 Miss. 814, 129 So. 2nd 642 (1961). Because that statute has been passed upon by this Court in *Nebbia v. People of New York*, supra, this Court has already indirectly approved of the price regulating provisions of the Maine Milk Commission Law. It is to be noted that Cumberland does not challenge the holding in *Nebbia*. Instead, the firm contends that the Maine Court has misapplied that holding. If that be so, then the same is true of the appellate courts in the majority of these United States.

In *Highland Farms v. Agnew*, 300 U. S. 608, 57 S. Ct. 549, this Court upheld the constitutionality of the Virginia Milk and Cream Act (a statute very similar to the Maine Milk Commission Law), and stated that the statute did not lay a wrongful burden on interstate commerce.

In *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 55 S. Ct. 7, this Court again upheld the New York Milk Act against a dairy's contention that the law was unconstitutional because a dealer was unable to make a profit.

This Court has expressly upheld the constitutionality of milk control acts of New York, Pennsylvania and Virginia, *Nebbia v. People of New York*, supra; *Hegeman Farms Corp. v. Baldwin*, supra; *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, 59 S. Ct. 528; *Pennsylvania Dairies v. Milk Control Commission*, 318 U. S. 261, 63 S. Ct. 617; *Board of Supervisors of Elizabeth County v. State Milk Commission*, 340 U. S. 881, 71 S. Ct. 198 (dismissal of the cause for want of a substantial federal question); and has, by inference, upheld the constitutionality of the milk control laws of Indiana and Wisconsin. *Milk Control Board v. Crescent Creamery*, 14 N. E. 2d 588 (Indiana), 305 U. S. 559, 59 S. Ct. 87 (appeal dismissed); *State v. Marriott*, 296 N. W. 622 (Wiscon-

sin), 314 U. S. 571, 62 S. Ct. 76 (appeal dismissed for want of a substantial federal question).

The case of *United States v. Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 59 S. Ct. 993, is further authority supporting the decision of the Maine Supreme Judicial Court. That case involved the Agricultural Marketing Agreement Act of 1937; an Act of Congress which was aimed at assisting in the marketing of agricultural commodities. Acting pursuant to the provisions of the Act, the Secretary of Agriculture (after holding public hearings) found that the milk which was produced for the New York marketing area was handled either in the current of interstate commerce or was so handled as to affect interstate commerce. Thereafter, the Secretary promulgated an order establishing minimum prices for milk in the New York market. In sustaining the constitutionality of the Act, this Court stated that a thorough exposition of the milk situation in New York was made in *Nebbia*; and that there was nothing more to be added to what was said there.

> "The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce. Since *Munn v. Illinois*, this Court has had occasion repeatedly to give consideration to the action of states in regulating prices.
>
> * * *
>
> "The power of a state to fix the price of milk has been adjudicated by this Court. The people of great cities depend largely upon an adequate supply of pure fresh milk. So essential is it for health that the consumer has been willing to forego unrestricted competition from low cost territory to be assured of the producer's compliance with sanitary requirements, as enforced by the municipal health authorities. It belongs to that category of commodities that for many years has been subjected to the regulatory power of the state. A

thorough exposition of the milk situation in the New York shed was made in the *Nebbia* case. There is nothing to add to what was there said * * * ." *United States v. Rock Royal Co-Operative*, supra, p. 569-570.

An examination of the applicable, plural decisions of this Court and of the state courts supports the Commission's position: The decision of the Maine Supreme Judicial Court is clearly correct. 101 A. L. R. 72; 110 A. L. R. 654; 155 A. L. R. 1403.

II

There is No Substantial Federal Question.

Appellant says that the Maine Milk Commission Law is invalid because it is designed as permanent legislation; and that a person engaged in selling milk at retail in Maine will never have the right to charge whatever retail price he wishes for his milk. This, says Cumberland, is a substantial issue. (Jurisdictional Statement, p. 9) Reduced to simple terms, appellant's contention is that the Maine Milk Commission Law is unconstitutional merely by virtue of the fact that it exists. We note that Cumberland has not advanced any authority in support of its contention. None is available. What court has ever decreed that a statute was invalid solely on the basis that it enjoyed existence?

Appellant presents no substantial federal question. Basically, Cumberland's complaint lies with the fact that the Maine Legislature has enacted a milk control law; and, as yet, has not repealed the statute. From this, Appellant concludes that the law is "permanent legislation"; and volunteers a prognostication that milk retailers are doomed. The Maine Milk Commission Law is no more permanent than any piece of legislation being enacted in regular fashion at the present session of the Maine Legislature. [In fact a

bill has been placed before the present legislative session which, if enacted into law, will remove the retail price from the jurisdiction of the Commission.] Cumberland further contends that the Maine Milk Commission Law would not be the subject of this appeal if it contained language which would cause the statute to expire by its own terms. The existence of this feature, says Appellant, would not permit the reference statute to be characterized as "permanent legislation"; and would, therefore, make the law acceptable to the Fourteenth Amendment to the Federal Constitution. This same contention had been presented to the Maine Court; and was rejected by that Court.

> "In *Nebbia* the New York legislation under which the proceedings were initiated expired within a designated period. It is our understanding that *Nebbia*, as well as the other cases cited in the opinion, was not based upon the fact that the legislation expired by its own limitation."
> (Jurisdictional Statement, p. 11a)

The Maine Court then quoted a portion of the Virginia decision in *Board of Supervisors of Elizabeth County v. State Milk Commission*, 60 S. E. 2d 35 (1950):

> " 'Mr. Justice Roberts, speaking for the court in *Nebbia v. People of State of New York* * * * did not base his decision upon an emergency, but on the ground that the milk industry was an industry affected with a public interest, and therefore subject to legislative control and regulation for the public good.' "

This Court, in its review of the *Board of Supervisors of Elizabeth County v. State Milk Commission*, supra, refused to entertain an appeal of the Virginia case wherein the state court's language was challenged. *Board of Supervisors of Elizabeth County v. State Milk Commission*, 340 U. S. 881, 71 S. Ct. 198 (appeal

dismissed for want of a substantial federal question). We respectfully request that this Court reject appellant's contention advanced in this appeal, i.e., that state milk control laws are violative of the Fourteenth Amendment to the Federal Constitution unless such legislation expires by its own limitations. If a state statute is found to be violative of the constitutional principles of "due process of law" or "equal protection of the laws", the violation will have occurred while the statute had life; not after the statute has expired.

This Court stated, some time ago, that the Fourteenth Amendment to the Constitution of the United States was not designed to interfere with the proper exercise of the police power of a state. *Barbier v. Connolly*, 113 U. S. 26, 5 S. Ct. 357. When the Maine Legislature enacted the original milk control law in 1935, it declared that the measure was the product of the state's police power. *P. L. 1935, chap. 13.* During the same period of time, other states were enacting similar public laws; and since that time, from time to time, Maine and her sister states have enacted amendments to such laws. With few exceptions the Maine Act has been amended in some respects at all legislative sessions from 1935 to date, and has been incorporated, as amended, in the Revised Statutes of 1944 and 1954. Only recently, the Maine lawmakers (at a special legislative session) amended the milk control statute so that the Maine courts were granted power to issue injunctions concerning the enforcement of the provisions of the statute. *P. L. 1961, chap. 410.* In this recent mandate, the Legislative emergency preamble to the Act reveals that the Maine Milk Commission Law serves the same need today as it served when originally enacted. Our Maine Court was not unmindful of these plural emergency preambles annexed to the original milk control law and to subsequent amendments of that law. In this regard, the Maine Court stated that it would "not substitute its judgment for that of the Legislature". (Jurisdictional Statement, p. I4a)

"* * * Even in the absence of legislative findings, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. *United States v. Carolene Products Co.*, 304 U. S. 144, 152."
(Jurisdictional Statement, p. 14a)

The Maine Milk Commission Law contains a provision which constantly reminds the Commission that it must adopt policies which progressively eliminate conditions existing in the milk industry requiring the need for the present law.

"* * * The Commission in administering the provisions of this chapter shall adopt such policies as are consistent with the promotion of marketing programs which progressively eliminate those conditions in the milk industry necessitating the present law. * * *" *7 M.R.S.A. § 2953*

In conclusion, an examination of the Jurisdictional Statement reveals to the reader that Cumberland has overstated its case. Cumberland's argument contains plural errors which, if corrected, materially change its presentation to this Court. First, Cumberland has misread the Maine Court's decision; and has volunteered an erroneous interpretation of that decision. At page 10 of the Statement, Appellant quoted a portion of the Court's language, and says of it that it is the Court's interpretation of the effect of the Maine Milk Control Law. In truth, the Maine Court was stating a contention which the Appellant had advanced in the State court appeal. Appellees consider this error to be of major importance even though committed inadvertently. Second, Cumberland has so arranged quoted material from the Maine Court decision that

the arrangement understates said decision. At pages 10 and 11 of the Statement, Appellant has repeated three sentences from the reference decision, and has so arranged them that they convey something less than that actually conveyed by the Court:

> "1. 'The object sought to be attained by the milk commission law is to prevent the disruption of the sales and distribution of milk through unfair, destructive and uneconomic practices.'"
>
> "2. 'The method of obtaining that objective was the establishment of prices in the state.'"
>
> "3. 'The means adopted by the legislature relate directly and appropriately to the object sought to be obtained.'"

Because sentence 1, above, was supplemented by the Maine Court through a follow-up sentence, and because the Appellant has chosen not to recite that sentence, the reference decision has been understated. The subject sentence thus omitted by the Appellant covered the legislative declaration that the sale and distribution of milk was so affected with the public interest that legislation was required for the preservation of the public health and safety. It was at this point that the Court then wrote of "the method of obtaining that objective". It is not the at-random selection of sentences which the Appellee protests; but, rather, the Appellee is disturbed by Appellant's omission of this material sentence when it works an understatement of the Maine Court's decision. Third, appellant says that the Maine Court has both quoted and relied upon a decision of the Virginia appellate court in *Board of Supervisors of Elizabeth County v. State Milk Commission*, 191 Va. 1, 60 S. E. 2d 35 (1950), but that the United States Supreme Court was never asked to review that case. In this, Cumberland errs. This Court was asked to review that case. *340 U. S. 881, 71 S. Ct. 198.* In that case, the appellee's motion

to dismiss was granted and the appeal was dismissed for want of a substantial federal question.

> "No. 381. Board of Supervisors of Elizabeth City County et al. v. State Milk Commission. Appeal from the Supreme Court of Appeals of Virginia. Per curiam: The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.
> Henry H. Fowler for appellants. J. Lindsay Almond, Jr., Attorney General of Virginia, for appellee. Reported below: 191 Va. 1, 60 S. E. 2d 35." *340 U. S. 881.*

Conclusion

We respectfully submit, therefore, that the decision below is clearly correct and that no substantial federal question is presented.

Respectfully submitted,

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